U.S. Department of Labor

Board of Alien Labor Certification Appeals
800 K Street, NW
Washington, D.C. 20001-8002

Date: **July 28, 2000**

BALCA Case No.: **1998-INA-133**

CO Case No.: **P1996-TX-12442**

In the Matter of:

EL RIO GRANDE
Employer,

on behalf of:

GALO M. NAREA
Alien.

Before: Burke, Holmes, Huddleston, Vittone, and Wood
Administrative Law Judges

JOHN M. VITTONE
Chief Administrative Law Judge

ORDER GRANTING RECONSIDERATION AND AFFIRMING *EN BANC* DECISION

In ***El Rio Grande***, 1998-INA-133 (Feb. 4, 2000) *(en banc)*, the Board of the Alien Labor Certification Appeals ("BALCA" or "Board") issued an *en banc* decision in the above captioned matter in which the central issue was whether classification of the position "Specialty Cook, Mexican" under the Service Contract Act ("SCA") "Cook II" subclassification for purposes of determining the prevailing wage was reasonable. *See* 20 C.F.R. § 656.40(a)(1). The matter also included, however, a challenge to the reasonableness of the wage determination itself, as the SCA wage determination was considerably higher than prior experience would suggest, and the Employment Standards Administration ("ESA") used a "slotting" technique authorized by 29 C.F.R. § 4.51(c) to determine the prevailing wage, but provided no information explaining how slotting was applied. Prior to reaching these issues, the Board raised, *sua sponte*, the issue of whether it has jurisdiction to review SCA wage determinations made in the context of applications for labor certification, and determined that it does.

On February 22, 2000, the United States Department of Labor Certifying Officer ("CO") filed a motion for reconsideration on the issue of the Board's authority to review prevailing wage determinations for permanent labor certification applications where the regulations at 20 C.F.R. §

656.40(a)(1) require use of the Service Contract Act ("SCA") wage rate.[1] Employer and *amicus curiae,* the American Immigration Lawyers Association ("AILA"), filed a joint response on March 22, 2000. This response added a request that the Board reconsider its holding that "slotting" may be used in determining SCA prevailing wages in labor certification cases.

Whether to reconsider in a particular case is left to the Board's discretion. *Edelweiss Manufacturing Co., Inc.*, 1987-INA-562 (Nov. 10, 1988) (*en banc*). We grant reconsideration; however, upon reconsideration we affirm the February 4, 2000 decision.

I. BOARD JURISDICTION

A. The positions of the parties

The CO, although recognizing BALCA authority to review a CO's decision as to whether a job opportunity is subject to a SCA wage determination in a labor certification case, argues that BALCA does not have jurisdiction to address the reasonableness of an SCA wage determination itself. Specifically, the CO argues:

- "The computation of SCA wages is a statutory responsibility assigned by regulation to the Employment Standard[s] Administration (ESA). *See* 29 C.F.R. §4.1 a." The "statutory determination" of a SCA wage determination can only be performed by ESA;

- Making the CO responsible for the appropriateness of the wage survey utilized by ESA would fail to recognize a difference between the provisions of 20 C.F.R. §§656.40(a)(1) and (a)(2)(i);

- Because permanent alien labor certification proceedings are not Administrative Procedure-Act-mandated hearings, the Board does not have the review authority to concern itself with a regulatory structure that does not provide for administrative review of SCA wage determinations which are applied to labor certifications applications;

- The BALCA decision in *Dearborn Public Schools,* 1991-INA-222 (Dec. 7, 1993)(*en banc*), holds that BALCA lacks authority to rule on the validity of a regulation or to invalidate the labor certification regulations as written, and thus the Board's concern about the "fairness" of a process that would preclude review of the reasonableness of a SCA wage determination is a matter for Article III courts and beyond the Board's responsibility.

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[1] The CO was granted an extension of time to file its motion for reconsideration. Amicus requested, and was granted an equivalent amount of time to file its response. *See Tel-Ko Electronics, Inc.*, 1988-INA-416 (July 30, 1990) (reconsideration *en banc*) (ten day limit for filing motion for reconsideration of Board decision).

Employer and *amicus'* response characterizes the CO's motion for reconsideration as an argument that "BALCA does not have jurisdiction to review the denial of a labor certification if a review of the denial involves a review of the method by which the SCA wage was determined in that case." They argue that such a view is contradicted by 20 C.F.R. § 656.26, which gives BALCA the jurisdiction - indeed, the regulatory duty - to review all aspects of a labor certification denial.

Employer and *amicus* argue that section 656.40(a)(1) does not deprive BALCA of jurisdiction to review the denial of labor certification if the denial involves a review of the method by which the SCA wage used in that case was determined. They observe that the plain language of section 656.40(a)(1) "only describes the circumstances under which a wage determination under the SCA or the Davis-Bacon Act should be used in labor certifications. It says nothing whatsoever about BALCA's jurisdiction to review a wage determination under the SCA or the Davis-Bacon Act in the context of a labor certification denial."

Employer and *amicus* argue that the CO's contention that BALCA lacks jurisdiction to review SCA wage determinations because the determination is made by ESA and not the CO, is undercut by Supreme Court authority to the effect that any jurisdiction to review agency action cannot be excluded implicitly. *See Abbott Laboratories v. Gardner*, 387 U.S. 136, 140-41, 87 S.Ct. 1507, 1511-12, 18 L.Ed.2d 681 (1967) and *Bowen v. Michigan Academy of Family Physicians*, 476 U.S. 667, 106 S.Ct. 2133, 90 L.Ed.2d 623 (1986). Finally, they argue that the regulations giving BALCA general jurisdiction to review denials of labor certifications provides jurisdiction over the subject matter of such denials - not over particular parties, such as the ESA or the CO - "[t]herefore, regardless of which agency has the responsibility to make prevailing wage determinations under the SCA, BALCA has jurisdiction to review that determination if it was used in a labor certification."

B. Discussion

We find that Employer and *amicus* have stated the better reasoned analysis of the scope of the Board's review authority. We note that the Supreme Court authority cited by Employer and *amicus* does not provide controlling authority as it discusses how to interpret Congressional intent to provide or limit an Article III court's authority to review. Nonetheless, we agree with the underlying principle that a reviewing body should not find implicit limits on its review authority based on indeterminate evidence of Congressional - or in this case - the regulatory drafter's - intent about the scope of the review authority authorized. We agree with Employer and *amicus* that there is nothing in the applicable regulatory language that evinces an intent to limit BALCA's authority to review prevailing wage determinations. Thus, we affirm the *en banc* decision in this respect.

We re-emphasize, however, what the *en banc* decision stated in regard to the standard of review. BALCA will not require absolute precision in the determination of SCA wage -- nor will it engage in recalculations of SCA wage determinations if reasonably made. Rather, the Board's decision is simply that the CO is responsible by the plain language of the regulation to obtain a SCA wage determination for use in a permanent alien labor certification proceeding - regardless of whether ETA or ESA is the agency that actually conducts the surveys and calculates the wage.

Thus, the decision does not require the CO to make an independent SCA wage determination but only to be prepared to explain how the determination was made.

In regard to the CO's specific arguments, we find (1) that the fact that ESA makes wage determinations for SCA covered cases, and that COs only borrow those wage determinations for labor certification purposes, does not relieve the CO of responsibility for explaining the determination if challenged -- nor does it implicitly bar BALCA review of the wage determination; (2) that recognizing the CO's responsibility to be able to explain a SCA wage determination does not cause an irreconcilable conflict between 20 C.F.R. §§ 656.40(a)(1) and (a)(2)(i); (3) the fact that BALCA review of alien labor certification applications is not statutorily required, and therefore not an APA-mandated hearing process, does not thereby establish that BALCA does not have the authority to review SCA wage determinations used in labor certification cases – the source of the Board's authority is the Part 656 regulations which vest a general review authority in BALCA to review denials of labor certification and do not include any express limits on the subjects the Board can consider; and, (4) the Board did not invalidate the regulation at section 656.40(a)(1) – rather, the Board considered whether it placed the review of SCA wage determinations made in labor certification cases in another forum,[2] and found that it did not. Since the regulation was not invalidated, *Dearborn Public Schools,* 1991-INA-222 (Dec. 7, 1993)(*en banc*), is inapposite.

II. SLOTTING

A. Positions of the parties

Employer and *amicus* argue that the Board overlooked, when considering whether the use of "slotting" as authorized by 29 C.F.R. § 4.51(c) to determine a SCA prevailing wage in a labor certification case, the impact of "Section 212(a)(5)(A)(i)(II) of the Immigration and Nationality Act, which requires that 'the employment of [a labor certification application beneficiary] will not adversely affect the wages and working conditions of workers in the United States *similarly employed.*'" Employer/*Amicus* brief at 6 (emphasis added as in brief). They argue that slotting violates this statutory directive because it compares the wages of different occupations to extrapolate a prevailing wage. Finally, they contend that even if the Board does not accept this argument, the CO should be "required to reveal the occupations compared in the slotting process and the criteria used for the comparison (such as job duties and/or qualifications for the occupations) ...."

The CO has not responded to this motion for reconsideration.

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[2]Compare *International Health Services, Inc. ads Administrator,* 1993-ARN-1 @ n.10 (ALJ Mar. 18, 1996), *review declined* (ARB May 30, 1996) (regulations governing Immigration Nursing Relief Act ("INRA") of 1989, 8 U.S.C. § 1101 *et seq.* found to place forum for challenges to the prevailing wage rate within the Job Service Complaint System regulations at 20 C.F.R. Part 658 rather than the INRA enforcement regulations). *To the same effect, Administrator v. Woodbine Health Care Center,* 1997-ARN-10 (ALJ July 7, 1997).

B. Discussion

We do not find the slotting procedure to be inconsistent with the statutory purpose of protecting the wages and working conditions of U.S. workers similarly employed. By its own terms, section 4.51 (c) requires "a comparison of equivalent or similar job duty and skill characteristics between the classifications studied ...." Thus, if slotting is applied, it is comparing similarly employed workers - admittedly on a somewhat imprecise level - but as we noted in the *en banc* decision, absolute precision is not required in making SCA wage determinations.

In regard to Employer and *amicus'* request for an order directing that when slotting is used, the CO minimally must disclose the occupations compared in the slotting process and the criteria used for the comparison, we believe that such a direction was already contained in the Board's *en banc* decision. The Board wrote:

> We hold that where slotting is used for a SCA wage determination, and Employer challenges the SCA wage determination, the CO must provide information on why slotting was used, which positions were compared, and why the comparison was reasonable. Once the CO does so, however, the ultimate burden of proof remains on an employer challenging a SCA prevailing wage determination to establish that the CO's wage determination is in error, and that it its wage offer is at or above the correct prevailing wage.

El Rio Grande, 1998-INA-133 @ 10 (Feb. 4, 2000) (*en banc*).

ORDER

Based on the foregoing, it is **ORDERED**

1. The CO's, Employer's and *Amicus'* motions for reconsideration are **GRANTED.**

2. The Board's holding that it has jurisdiction to review SCA wage determinations made in the context of applications for alien labor certification under 20 C.F.R. Part 656 is **AFFIRMED.**

3. The Board's holding that slotting under 29 C.F.R. § 4.51(c) may properly be used to determine a prevailing wage for a SCA-covered occupation for purposes of alien labor certification is **AFFIRMED**.

FOR THE BOARD:

JOHN M. VITTONE
Chairman Board of Alien
Labor Certification Appeals and
Chief Administrative Law Judge

JMV/trs